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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No.

BETTY JEAN TYSON, *Petitioner*

v.

VIRGIN ISLANDS NATIONAL BANK, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United Staes Court of Appeals for the Third Circuit entered in the above case on December 30, 1974.

OPINIONS BELOW

Memoranda orders of the District Court for the Virgin Islands, Division of St. Thomas and St. John, confirming sale (Appendix, page 8a), denying motion for an order to reopen case and amend judgment (Appendix, page 9a), and denying the motion for an order to set aside the judicial sale (Appendix,

page 10a), are unreported. The opinion of the Court of Appeals for the Third Circuit is reported at 506 F.2d 802 and appears in the Appendix at page 1a.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was made and entered on December 30, 1974 (Appendix, page 7a). The jurisdiction of this Court is invoked under 28 USC § 1254(1). Jurisdiction of the District Court in the first instance is pursuant to 48 USC § 1612.

QUESTIONS PRESENTED

In proceedings on a writ of execution for a judicial sale of 53 acres of land pursuant to a judgment of foreclosure on a mortgage note. Respondent judgment creditor filed a motion under 5 VIC § 489(1) to confirm the judicial sale without serving a copy of its motion on the Petitioner judgment debtor. The court entered the order on a *ex parte* basis.

Respondent's motion to confirm the judicial sale was filed on June 28, 1973. The court's order confirming the sale was entered on July 5, 1973. On July 10, 1973, Respondent's counsel served notice on counsel of record for Petitioner together with a copy of its June 28 motion to confirm, which notice specified that the motion to confirm would be heard by the District Court on July 16, 1973. Petitioner appeared in court for the hearing pursuant to the notice on July 16, 1973 and there was informed by the court that it had entered the order confirming the sale on July 5, 1973.

Thereafter, Petitioner sought to reopen the case and amend judgment, and separately sought to have the judicial sale set aside and a new sale ordered. The

District Court denied all relief sought by Petitioner on the basis that its Local Rule 6 authorized its entry of the order under the circumstances and further concluded that there were no other grounds warranting Petitioner's requested relief. The Court of Appeals affirmed. The questions presented are:

1. Whether the District Court may confirm a judicial sale of real estate sold to satisfy a judgment on a mortgage note in *ex parte* proceedings where the owner and judgment debtor are denied both notice of, and the opportunity to be heard in, the proceedings.

2. Whether the District Court's failure to observe its own Local Rule 6 relating to service and notice of all motions, and thereby deprived Petitioner notice and the opportunity to be heard or respond to a proposed motion to confirm a judicial sale, afforded Petitioner due process of law or, alternatively, provided adequate grounds for relief under FRCP 60(b).

3. Whether the District Court abused its discretion in denying Petitioner relief under FRCP 60(b) from an order confirming a judicial sale where the order was considered and entered on an *ex parte* basis and without notice to the Petitioner.

STATUTES AND COURT RULES INVOLVED

The pertinent portion of the Virgin Island Code, § 489; Local Rule 6 of the District Court for the Virgin Islands, and Rule 60(b) of the Federal Rules of Civil Procedure are set forth in the Appendix, beginning at page 10a.

STATEMENT OF THE CASE

This action arises out of proceedings by Respondent Virgin Islands National Bank to foreclose on its security for a $165,000 mortgage note executed on

April 6, 1971, by Petitioner Betty Jean Tyson, The entire principal and interest on the note was payable on or before December 31, 1971 and the note was secured by a first priority mortagge on 53 acres of real estate and improvements (which included Petitioner's home), located on the island of St. Thomas, U. S. Virgin Islands. Upon default in the payment of the note, Respondent filed its Complaint For Debt and Foreclosure in the District Court on April 27, 1972 and obtained judgment therein on July 13, 1972. A writ of execution on the judgment was issued on October 3, 1972. The United States Marshal conducted the judicial sale of Petitioner's real estate on April 18, 1973 and his return of service was filed on June 18, 1973.

On June 28, 1973, Respondent's counsel filed its motion to confirm sale in the District Court. Respondent's motion was not served on Petitioner at or before the time it was filed with the court, nor did it contain a certificate of service as required by the District Court's Local Rule 6(j). On July 5, 1973, the District Court granted the Respondent' motion to confirm the judical sale and entered its order.

On July 10, 1973, Respondent's counsel served a copy of its June 28 motion to confirm the judicial sale together with a notice that the motion was being set for a hearing on July 16, 1973. Pursuant to the notice, Petitioner appeared in the District Court on July 16, 1973 and learned from the court that the confirmation of the judicial sale had already been accomplished and that no hearing was necessary.

Thereafter, Petitioner appeared at Respondent bank on January 8, 1974 to redeem her property, which date was the first business day following the expiration of

the six-month redemption period provided for under local law and was then informed that Petitioner's redemption rights had expired on January 7, 1974. Subsequent to her conference with the Respondent, but on the same day, Petitioner filed her first motion in the District Court seeking to reopen the case and amend judgment, the stated objective of which was to have the confirmation order of the judicial sale deemed to have been entered as of July 16, 1973, in conformity with the notice Petitioner had received. This motion was denied after a hearing on February 12, 1974.

On February 14, 1974, Petitioner filed a second motion in the District Court seeking to have the order of confirmation of the judicial sale of July 5, 1973 vacated, the April 18, 1973 judicial sale set aside and a new judicial sale ordered. At the hearing on this motion, Petitioner testified that at the time of the judicial sale she was then without counsel as was not familiar with the legal proceedings surrounding the judicial sale and order confirmation of the judicial sale. The District Court denied Petitioner relief upon reliance that its Local Rule 6 authorized the entry of its prior order of confirmation and that no other basis for relief was available to Petitioner.

On appeal, the Court of Appeals characterized the question presented as involving solely whether the District Court abused its discretion in denying Petitioner relief from its order of July 5, 1973. The Court of Appeals, *sub silentio,* approved the application of the Local Rule 6 as applied in this case. The Court of Appeals did not discuss the merits of Petitioner's objections to the conduct of the judicial sale but simply indicated that it was withholding relief

because "judgment debtors may not assert untimely challenges on the basis of irregularities which were readily ascertainable before the close of the statutory period for filing objections". Appendix at page 5a. Similarly, the Court of Appeals did not address the issue of Petitioner's lack of counsel at the critical time the objections could have been timely filed, i.e., within five days folowing the sale. 5 VIC § 489(1).

The Court of Appeals and the District Court both turned aside the judicial precedent of the court entertaining objections to judicial sales on the merits at any time prior to the judicial sale. *Lucerne Investment Company* v. *Estate Belvedere, Inc.,* 7 V.I. 275 (D., V. I., 1969). In *Thornberg* v. *Jorgensen,* 1 V. I. 606, 60 F.2d 471 (3rd Cir., 1932), it appears that the Court of Appeals remanded the case for the consideration of objections to a judicial sale following the order of confirmation.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it erroneously applies the concepts of due process that deprive unrepresented judgment debtors in mortgage foreclosure proceedings of notice and the opportunity to be heard. Additionally, the decision below sanctions the deprivation of legal rights by a District Court's failure to observe its own rules.

Judicial precedent permitted objections to judicial sales of real estate in the Virgin Islands to be heard on the merits at any time prior to the entry of the judicial order confirming the sale. Petitioner possessed valid and meritorious objections to the judicial sale of her property, but was denied notice that the motion for confirmation of the sale had been submitted prior to

its entry, and was mislead by the notice of the Respondent as to the time when her objections might be presented to the District Court. The proceedings below do not satisfy the appearance of justice. *In Re Murchinson,* 349 U.S. 133 (1955); *Offut* v. *United States,* 348 U.S. 11 (1954). Due process under the Fifth Amendment to the Constitution requires notice of the proceedings as an absolute minimum.

The District Court relied upon its Local Rule 6(j) to sustain its action. Other paragraphs of that Rule were not applied. Rule 6(g) provides:

> (g) The movant and respondent shall serve copies of their respective papers upon opposing counsel before they are filed with the clerk, and such papers must indicate the time and method of service.

This portion of the Rule was not observed by Respondent's counsel or the court.

Additionally, Local Rule 6(j) precluded the court acting upon Respondent's motion for confirmation of the judicial sale. In pertient part, it provides

> (j) * * * Motions filed which are not in conformity with this rule *shall not* be entertained by the court. (Emphasis added.)

That Petitioner did not have notice, and that the motion for confirmation of the judicial sale was not served upon Petitioner or any other person affiliated with Petitioner, and that Respondent's motion did not indicate the time and method of service, are beyond dispute. The District Court and the Court of Appeals reliance on Local Rule 6 to sustain the action of the District Court in this case is not justified.

The Court of Appeals imputes knowledge of the statutes governing Petitioner's rights to the Petitioner, which if correct, should likewise impute knowledge of the court rules and the judicial precedents applicable to Petitioner's proceeding. Justice cannot be a selective application of legal rules, particularly when FRCP 60(b) is invoked as the basis for relief.

Additionally, the decision below in the context of the facts in this case, sanctions a departure from the accepted and usual course of judicial proceedings to such an extent as to warrant the exercise of this Court's power of supervision. Both the District Court and the Court of Appeals had the facts of two evidentiary hearings on Petitioner's two motions for FRCP 60(b) relief before them. FRCP 60(b) calls upon the judiciary to apply equitable principles of fairness and does not demand that issues presented rise to Constitutional proportions before relief can be granted thereunder. *See, Klapport* v. *United States,* 335 U.S. 601 (1949).

Instead of applying FRCP 60(b) in the manner intended for just such a case as the instant one, the courts below imputed to Petitioner the knowledge of one schooled in law, rather than a standard of legal knowledge that could reasonably be expected of the laity. The Court of Appeals tersely denied Petitioner's claim for relief by charging her with constructive knowledge of the objections to the judicial sale within five days after the sale was held, and charges her with the constructive knowledge of the means and methods of presenting them. This establishes too high a standard for an unrepresented litigant.

In times of economic distress, mortgage debtors face foreclosure proceedings on real estate more frequently

than in times of economic prosperity. It is likely, also, that mortgage debtors will not have the funds to employ counsel to represent them while mortgage creditors will. The courts should protect the interests of the judgmement debtor, at least to the extent that the judgment debtor is made aware of the need for counsel or the opportunity to interpose objections to the judicial sale, that the court satisfy itself that all parties have been given ample notice, and that the court observe and apply its own rules. Furthermore, once the judgment debtor becomes aware of meritorious objections to the sale, FRCP 60(b) should be liberally construed, and the courts should exercise their judicial discretion thereunder broadly, so that plausible objections can be determined on their merits within the time limitations of FRCP 60(b). In this case, all motions were timely within all provisions of FRCP 60(b). Unless such a construction is placed upon FRCP 60(b), the administration of justice will not satisfy the appearance of justice, or in fact provide justice, for unrepresented judgment debtors. Cf., *Garner* v. *Tri-State Development Co.*, 382 F.Supp. 377 (E.D., Mich., 1974).

At the time of the judicial sale on April 18, 1973, any objections Petitioner might have to the judicial sale became fixed. Infirmities and irregularities in that sale could not thereafter be constructed or created. The decisions below preclude Petitioner relief where, had she been able to afford and be represented by counsel at the critical stage for filing the objections, relief would be available to her and thus exact a forefeiture of her rights in her property while glossing over the principles of fairness and equity that justice demands.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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